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Supreme Court of the United States

October Term, 1958

No. 250

BAUER-SMITH DREDGING CO., INC.,
Petitioner-Defendant below,

versus

ROY TULLY, ET AL., *Respondents-Plaintiffs below*

PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals
Ninth Supreme Judicial District
Beaumont, Texas

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Petitioner prays for issuance of a writ of certiorari to review the judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas. The Supreme Court of Texas refused Petitioner's application for writ of error. A motion for rehearing was overruled by the Supreme Court of Texas on May 14, 1958.

Opinions Below

Petitioner removed this case to the Federal Court. The case was remanded to the State Court on Plaintiff's motion presented to the District Court for the Eastern District of Texas. The U. S. District Court's decision dated November 19, 1953 is unreported but is set out in the Appendix pages 51, 52.

Judgment was entered by the 60th District Court of Texas at Beaumont, Texas, against the Petitioner-Defendant. See Appendix pages 5-25. This judgment was affirmed by two judges of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas. See Appendix pages 25-51. The opinion is reported in 305 S.W. 2d 805. The Texas Supreme Court ruled that the petition for writ of error presented no error which requires reversal of the judgment of the Texas Court of Appeals. Petitioner's motion for rehearing was overruled. See Appendix page 50.

Jurisdiction

Judgment of the trial court for plaintiff was affirmed by the Court of Civil Appeals of Texas on September 19, 1957 and a motion for rehearing was overruled on October 16, 1957. An application for a writ of error to the Texas Supreme Court was refused on April 16, 1958, and a timely motion for rehearing was overruled on May 14, 1958. Jurisdiction of this Court is invoked under 28 *U.S.C.* 1257 (3) on the grounds that a Federal easement and the rights, privileges and immunity of a Federal dredging contractor are involved as well as a Federal question relating to the Constitution and laws of the United States including various River and Harbor Acts of the United States, Title 33 *U. S. Code* (Appendix pages 1-5), and a Federal dredging contract (Defendant's Original Exhibit 3) and a Federal dredging easement. Appended to this petition pages 25-27 (Defendant's original exhibit 1).

Questions Presented

1. Whether State Courts, in a civil action filed by a private citizen not in privity to a Federal dredging contract, can divest Congress, the Secretary of Army and the designated Contracting Officer of the Corps of Engineers U. S. Army, of the exclusive right, power and authority to construe its own Federal dredging contracts and the right to determine the manner in which they are performed and at the same time disregard the Federal Government's decision that its dredging contract was completed according to Federal plans and specifications and that their agent did not exceed its authority and executed the will of Congress.[1]

2. Whether a State Court can assume jurisdiction of a lawsuit, filed by the grantor of a Federal dredging easement against a Federal dredging contractor, for willful trespass upon a Federal dredging easement, when the easement grants to the Federal Government and its agents the right to do the very acts complained of, to-wit: to deposit dredged material from the Intracoastal Canal anywhere upon grantor's land adjoining the Canal.[2]

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[1] This Court ruled in **Yearsley v. Ross Construction Co.**, 309 U.S. 18, that "if the will of Congress was executed" the agent could not be sued. No State has ever before attempted to adjudicate the question of whether a Federal agent properly performed its Federal dredging contract after the Federal Government accepted performance and paid for the work done or challenged this Court's ruling in the cited case. Also see **U. S. v. Appalachian Electric Power Co.**, 311 U.S. 377 (1940).

[2] See Government Easement appended to this Petition, pages 25-28. Defendant's Original Exhibit No. 1.

3. Whether a Federal dredging contractor, acting under the supervision, direction and control of the Corps of Engineers U. S. Army, can be held liable in a State Court for improper performance of a Federal dredging contract after the Federal Government, with full knowledge of all the acts complained of, certifies that the dredging work was completed according to Federal plans and specifications[3] and accepts and pays for the dredging service performed.

4. Whether a servient riparian landowner, can establish a negligence and trespass action against a Federal dredging contractor based upon the performance of a Federal dredging contract, where a contractual duty exists solely between the contractor and the United States and there is no proof that the Federal dredging contractor owed any "duty" to the servient riparian landowner who had previously granted to the United States and its agents, the right to deposit dredged material upon the land in question and warranted that the land would not be used so as to "interfere with or abridge the rights and easements" granted to the United States.[4]

5. Whether a Federal dredging contractor is deprived of property without due process of law when a State Court renders a judgment against it based upon the manner in which dredging services were performed under the supervision, direction and control of the Federal Government,

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[3] See Certificate of Completion, page 10, infra.

[4] **House v. Houston Waterworks**, 88 Texas 233, 31 S.W. 179, 181 (1885), Sup. Ct. Texas holds that where a third party is not in privity to a Government contract no duty is owed and he has no cause of action against the contractor.

After the Federal Government approves the contractor's performance of a dredging contract the Federal Government adopts the acts of its agent. **Yearsley v. Ross Construction Co.**, 309 U.S. 18, 21 (1940).

and where the Federal agent's acts are adopted, approved, certified and accepted as being completed in accordance with Federal specifications and contract drawings.[5]

6. Whether State Courts can assume admiralty jurisdiction of a lawsuit involving a maritime tort based upon improper performance of a maritime dredging contract, to which respondent is not in privity, when all of the parties to the maritime contract are not before the State Court and the rights of the parties are not governed by the uniform system of admiralty law and the rules of pleading, practice and procedure of that system of law.[6]

7. Whether a landowner, who relies upon the terms of a Federal dredging contract to establish a claim for damages against a Federal dredging contractor, must comply with all the terms of the Federal dredging contract before a lawsuit can be filed, where the Federal contract provides that all "disputes" concerning the contract, not disposed of by mutual agreement, "shall be decided by the Contracting Officer" as distinguished from local State Courts[7] and where the contract provides that in order to reopen the Federal dredging contract, there must be evidence of "collusion, fraud or error".[8]

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[5] Certificate of Completion quoted infra page 10, and **Yearsley v. Ross Construction Co.**, 309 U.S. 18, 21 (1940), which holds that the Federal agent cannot be sued after the Federal government accepts the agent's work.

[6] 46 **U.S.C.** 740, and General Admiralty Rules by this Court.

[7] The dispute as to whether or not the dredged material was deposited in places designated in the Federal contract was not submitted by respondents to the Federal Contracting Officer or the Secretary of Army as required. See **U. S. v. J. A. Helpuck Co.**, 328 U.S. 234, 239 (1946). The original contract is sent up with the record and is Defendant's Exhibit No. 3.

[8] No evidence of collusion, fraud or error was submitted to the State Courts, and no issue of fact concerning same was presented by respondent, nevertheless, the Texas Courts reopened the Federal contract and disregarded its provisions.